United Nations AT/DEC/1163

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1163

Case No. 1245: SEAFORTH Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, President; Mr.Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas, on 19 June 2001, Herbert Seaforth, a former staff member of the United Nations, filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 January 2002 and once thereafter until 28 February 2002;

Whereas on 28 February 2002, the Applicant, after making the necessary corrections, again filed an Application, requesting the Tribunal, inter alia:

> "8. To order that the Applicant be awarded a separation package comparable to that offered to staff on permanent appointment who have served in the United Nations for a similar period;
>
> 9. To order that the Applicant be compensated for the emotional distress and injury, damage to his professional standing and substantial reduction in his pension entitlements that resulted from the action of the designated representatives."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2002;

Whereas the Respondent filed his Answer on 17 April 2002;

Whereas the Applicant filed Written Observations on 17 May 2003;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Centre for Human Settlements (UNCHS), Nairobi, on a short term appointment as an International Expert (Microcomputer Systems) at the L-3 level, on 4 January 1983. On 10 January 1984, the Applicant received an appointment as an Information Systems Analyst at the P-3 level until 10 August 1984, when his appointment was converted to an intermediate term contract under the 200 series of the Staff Rules, and his functional title changed to Project Officer-Database Management, at the L-3 level. The Applicant served at the L-3 level on various 200 series appointments until promotion to L-4 on 1 March 1989, when he was promoted to L-4. He separated from service on 31 March 1999.

In 1998, a UNCHS Revitalization Team was appointed by the Acting Executive Director, UNCHS, to evaluate possibilities for reorganizing UNCHS. The Revitalization Team made a series of recommendations, including a recommendation to downsize the number of staff and discontinue a pattern of misuse of 200 series posts for the performance of core functions. The team specifically noted that UNCHS was employing 19 professional staff under 200 series contracts while the responsibilities performed by these staff members "most likely require that those staff should work under 100-series contracts".

On 20 November 1998, the Chief, Human Resources Management Service (HRMS), UNON, informed the Applicant that the Acting Executive Director, UNCHS, had decided not to extend his appointment beyond its expiry date of 31 December 1998. However, on 1 December 1998, the Acting Executive Director, UNCHS, decided to extend the Applicant's contract on an exceptional basis for a further three months until 31 March 1999.

On 27 April 1999, the Applicant requested payment of a "separation package comparable to that of staff on permanent appointment" on the basis of his 15 years of service and his above average performance.

On 3 May 1999, this request was denied by the Chief, HRMS, UNON.

On 30 June 1999, the Applicant requested the Secretary-General to review the administrative decisions not to renew his appointment and not to grant him a termination indemnity.

On 5 October 1999, the Applicant filed an appeal with the Nairobi JAB. The JAB Panel submitted its report on 21 February 2001. Its considerations, conclusions, and recommendations read, in part, as follows:

"Considerations:

1. Regarding the Appellant's contention that he deserves compensation or indemnity for having been employed under a 200 Series contract while as in fact he should have been awarded [a] 100 Series contract the Panel rejects this line of argumentation. ...

In addition, the Panel [felt] that the nature of the Appellant's functions, were not as clearly core-functions as the Appellant would like the Panel to believe.

It seems to the Panel that the establishment of a functioning Information Technology System for Habitat could indeed be a task for a limited duration, which, once fulfilled, would merely require maintenance and improvement. It is not evident why the maintenance and improvement of the system would necessarily have to be performed by the Appellant.

The Panel also believes that the Appellant is violating the principle of *venire contra factum proprium* when he accuses the organization of a wrongful act in which he himself was a participant. As the term 'contract' implies, it is an instrument, which is reached by agreement, thus requiring a consensus on both sides. The Appellant voluntarily and knowingly entered into the long sequence of 200 Series contracts.

Lastly and not least importantly, the Panel believes that this contention is time barred by the *doctrine of lache[s]*. The Appellant cannot now raise an issue with the Joint Appeals Board, which he himself has knowingly and willingly accepted for more than 15 years. ...

2. The Panel also rejects the second contention on the basis that the decision by the Respondent not to implement the Revitalization Team's recommendations was a policy issue which the Respondent was in his right to take. The decision not to extend the Appellant's fixed-term contract was dictated by the exigencies of avoiding duplication of ITS related functions within UNON and UNCHS (Habitat). ...

3. The Appellant contention that he had a reasonable expectancy of renewal of his contract or conversion to a 100 Series contract is without legal basis. The rules governing the Appellant contract and the terms of the contracts agreed upon by the Appellant clearly state that his fixed-term appointment did not carry any expectancy of renewal or conversion to any other type of appointment.

...

4. Concerning the fourth contention, namely that UNCHS (Habitat) breached its moral and good faith obligations by not making any attempt to place the Appellant within UNON or UNEP, the Panel believes that this contention is without merit for two reasons:

'Firstly, the decision to absorb the Appellant within UNON rested with that agency and not with UNCHS (Habitat). It goes without saying that UNCHS (Habitat) cannot be accused of violating the staff member's rights in matters where it has no decision-making powers.

... The Panel found no evidence that the Appellant had actually applied for that position. The Appellant argument loses its persuasiveness when he accuses the Respondent of not making good faith efforts to place him on a different post while he himself has not made sufficient efforts to ensure his continued employment.'

5. The contention that the Appellant's separation was not the result of a fair and objective reorganization dictated by the exigencies of the organization is equally without merit.

... The Panel finds that the Appellant has not presented any evidence that would allow the conclusion that he had been treated arbitrarily or that his separation was the result of an unfair process. ...

Conclusions and recommendations

In light of the foregoing considerations the Panel concludes that the Appellant has neither a claim for compensation nor for indemnity payment.

The Panel therefore recommends to the Secretary-General that the present appeal be rejected in its entirety."

On 22 March 2001, the Under-Secretary-General for Management, advised the Applicant that the Secretary-General had accepted the conclusions and recommendation of the JAB and decided to take no further action on the Applicant's appeal.

On 28 February 2002, the Applicant filed the above referenced appeal with the Tribunal.

Whereas the Applicant's principal contentions are:

1. In view of successive renewals of the Applicant's contract for fifteen years, of his performance of essential and continuing core functions, and of the recommendations of the Revitalization Team and UNCHS (Habitat) management, the Applicant had a reasonable expectation of one of the following actions: renewal of his contract; conversion to a 100-series contract; an earnest search by the Respondent for equivalent alternative employment.

2. The Respondent breached his moral and good faith obligation by not making a *bona fide* search for an alternative post to which the Applicant could be appointed;

3. The designated representatives of the Respondent abused their authority by abolishing the post of the Applicant without making any effort to find an alternative appointment for the Applicant;

4. The decision of the Respondent in not renewing the appointment of the Applicant was affected by extraneous motives;

5. The designated representatives of the Respondent by their own actions, created the impression that there was no difference between 100 series and 200 series contracts except in the recruitment process;

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right under his fixed-term appointment nor the legal expectancy of continued employment with the United Nations. The Applicant served on a series of fixed-term appointments which do not carry any expectancy of renewal. The decision not to renew the Applicant's appointment did not violate his rights.

2. The decision not to renew the Applicant's appointment was not vitiated by extraneous factors. Nor was the Applicant a victim of discrimination.

3. The Respondent did not abuse his discretion when abolishing the Applicant's post.

4. Upon the expiration of his fixed-term appointment the Applicant was not entitled to receive a termination indemnity comparable to that of staff on permanent appointments.

5. The Applicant did not sustain any material or moral injuries as a result of the Respondent's decision not to renew his fixed-term appointment and is not entitled to compensation.

The Tribunal, having deliberated from 3 November to 21 November 2003, now pronounces the following Judgement:

I. The Applicant seeks review of a decision by the Respondent not to renew the Applicant's fixed-term contract. The Applicant also challenges the Respondent's failure to convert the Applicant's 200 series contract to a 100 series contract or to engage in an earnest search to find alternative equivalent employment for the

Applicant, when his contract was not renewed. The Applicant requests the Tribunal to determine that the failure of the Respondent to either (1) renew the contract, (2) convert the contract or (3) find suitable alternative employment was a breach of the Respondent's moral duty to Applicant and an abuse of authority by the Respondent. Finally, the Applicant asserts that the Respondent's actions were discriminatory against the Applicant and were based on extraneous factors.

II. The Applicant held an appointment under the 200 series of the Staff Regulations and Rules (the "200 series"), the rules applicable to technical assistance project personnel. The Applicant concedes that his contract was of the 200 series, but he alleges that the substance of his duties was essentially equivalent to the core functions generally performed by a 100 series staff member who is governed by the 100 series of the Staff Regulations and Rules (the "100 series"). Since the Applicant was, he alleges, in actuality, performing the work of a 100 series employee, the Applicant contends that he should have been treated the same as a 100 series contract employee with respect to his separation from service. He alleges that he was entitled to a renewal of his contract, or in the alternative, to a conversion of such contract, or finally, to a good faith effort on the part of the Respondent to find him a suitable replacement post when his contract expired. He also asserts that he was entitled to receive a separation payment upon separation, similar to that received by permanent appointment employees.

III. The Tribunal first addresses the Applicant's claim that he had a reasonable expectancy to a renewal of his temporary appointment. The Tribunal notes, first and foremost, that there is no legal expectancy to renewal with respect to any fixed term contract, even where the employee has demonstrated efficient or exceptional performance. (See Judgments No. 440, *Shankar* (1989); and, No. 1049, *Handling* (2002).) This is true even when the employee has enjoyed a lengthy term of service. (See Judgements; No. 466, *Monteiro-Ajavon* (1989); and, No. 496, *Mr. B.* (1990).) That there is no such expectancy of renewal is expressly stated on the face of every contract for a fixed term. Where there are countervailing circumstances, however, including, for example, abuse of discretion or a promise or agreement to renew, a reasonable expectancy of renewal may be created. (See Judgement No. 885, *Handelsman* (1998).)

IV. The Tribunal has previously recognized the distinction between posts governed by the rules of the 200 series and those governed by the rules of the 100 series. (See, *Handelsman, ibid.*) Under staff rule 204.3:

> "Project personnel shall be granted temporary appointments as follows:
>
> (a) Temporary appointments shall be for a fixed term and shall expire without notice on the date specified in the respective letters of appointment. They may be for ... short, intermediate or long term ...
>
> (d) A temporary appointment does not carry any expectancy of renewal."

Since 200 series appointments are "entirely dependent on contingencies such as the requests of Governments and the availability of funds ... [t]he 200 series system simply could not function as intended, if staff members appointed under the 200 series had the same guarantees concerning employment and career development as staff members appointed under the 100 series. (See *Handelsman, ibid.*) Thus, generally, the rules of the 200 series do not provide for career appointments, like the rules of the 100 series do, but merely provide for the granting of temporary appointments.

V. In *Handelsman*, the Tribunal noted the Respondent's ability to separate a staff member appointed under a 200 series post, "without prior notice and without regard to either the quality of the quality of the services performed by the staff member or the staff member's personal attributes" pursuant to staff rule 209.2(c), which provides:

> "(c) A separation as a result of expiration of a fixed-term appointment shall take place automatically and without prior notice on the expiration date specified in the letter of appointment."

The Tribunal also reiterates the general rule that "unless there exist countervailing circumstances, project personnel staff members may see their relationship with the Organization terminated when the last of their 200 series appointments expires. Countervailing evidence may include (1) an abuse of discretion in not extending the appointment, (2) an express promise by the Administration that gives a staff member an expectancy that his or her appointment will be extended. The Respondent's exercise of his discretionary power in not extending a 200 series contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors." (See *Handelsman, ibid.*, para. III.)

The Applicant was indeed a project personnel staff member subject to the rules of the 200 series. As such, barring any countervailing circumstances, he was subject to separation from service by the Respondent, upon the expiration of his 200 series contract, without prior notice and without regard to his performance or attributes.

VI. The Tribunal next turns to whether any countervailing circumstances existed, such that the Applicant might claim a reasonable expectancy of renewal. In support of his position that he did have a right to renewal, the Applicant asserts that he was employed by the Respondent for approximately fifteen years and that his contract was renewed twenty two times over fifteen years. He also asserts that on several occasions, his contract expired, he continued to work without a contract and then his contract was renewed. Also, he notes the "very good" performance evaluations he received over the course of his employment and the recommendation of one of his supervisors, requesting that he be maintained in the service of the United Nations. Finally, he alleges that he had received assurances from two Acting Executive Directors of UNCHS that each would use all efforts to obtain sufficient funds to continue his post. These factors, however, individually and taken together do not satisfy the countervailing circumstance test of *Handelsman*. The length of his employment and his good performance are not causes to create a reasonable expectancy. Similarly, the fact that he allegedly worked without a contract in between renewals is also irrelevant. The Applicant provides no evidence that on those occasions, he was informed that his contract would expire. Rather, the Tribunal can only conclude that on those occasions, the Applicant was told that his contract would be renewed, and that the official renewal did not occur until after the previous contract had expired, thus causing the Applicant to work without officially having a contract. Finally, the assurances of his supervisors, that they would use their best efforts to obtain financing needed to maintain his employment, do not rise to the level of express promises or agreements required by *Handelsman*. The Applicant was well aware of the financial difficulties that UNCHS and UNON faced and of the recommendations by the Revitalization Team to downsize UNCHS. He also knew that, during his employment, UNON had advertised a post the duties of which overlapped with his. The Tribunal finds it difficult to understand how, in light of these potentially significant financial difficulties, the Applicant reasonably could have expected that his contract would necessarily be renewed.

VII. The Tribunal now turns to the Applicant's claims that (1) the Respondent abused the staff rules by employing the Applicant under the 200 series, while assigning him duties under the 100 series and that (2) when the Respondent failed to renew the Applicant's contract, the Respondent had an obligation to convert the Applicant's 200 series post to a 100 series post. The Tribunal has previously held that a staff member "cannot use his factual situation as an argument to claim a legal status different from his contractual status". (See Judgement No. 233, *Texiera* (1978), para. IV.) Thus, the Applicant cannot use his actual employment as a 200 series staff member to claim he was entitled to benefits of a 100 series staff member. Also, the Applicant has not provided sufficient evidence to persuade the Tribunal that his functions were, in reality, those of a 100 series post. The Tribunal's findings as to his functions are in keeping with the conclusions reached by the JAB, which noted in its report that "the nature of the [Applicant's] functions, were not as clearly core-functions as the [Applicant] would like the Panel to believe". The Tribunal also notes the express language on the face of the 200 series contract, which states that "[t]his type of appointment carries no expectancy of ... conversion to any other type of appointment or any activity of the United Nations". Finally, although the Tribunal notes the recommendation of the Revitalization Team to reclassify the Applicant's post, as well as 18 others, as 100 series posts, the Tribunal is satisfied that a recommendation is only that, and nothing more; the Respondent was not obligated either to agree with the recommendation or to follow it. The fact remains that the Applicant had a 200 series appointment, not a 100 series appointment, and thus he was subject to the rules of the 200 series. Thus, the Applicant is not entitled to claim status or benefits provided under the rules of the 100 series, nor was he entitled to a conversion of his 200 series contract to a 100 series contract.

VIII. The Tribunal next addresses the Applicant's claims that the Respondent "abolished" his post, that the "abolition" by the Respondent of the Applicant's post was an abuse of authority, and that the Respondent had an obligation to engage in a search for a suitable replacement post. First, with respect to the Applicant's claim regarding "abolition" of post, the Tribunal notes that there is no evidence, other than the Applicant's characterization of the events, that the post was abolished. Instead, there is only evidence that the Applicant's contract was not renewed. The reasons for non-renewal were affirmed by the JAB, which found that the Applicant's contract was not renewed for reasons relating to the creation of UNON and the necessity to avoid duplication of ITS functions, i.e., redundancy of job duties.

The Tribunal cannot agree with the Applicant's characterization of his non-renewal as an "abolition of post". When a staff member's service is subject to a fixed-term contract, especially when that fixed-term contract is a 200 series, project contract, which by its very nature is temporary, the failure to renew the contract is not an abolition of post. The Tribunal first notes that Respondent obligations stemming from an "abolition of post" are addressed in the rules of the 100 series, not the rules of the 200 series. Rule 109.1(c) provides, in relevant part:

> "(c) Abolition of posts and reduction of staff
>
> (i) ... if the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service."

Thus, where there is an abolition of a 100 series post, the Respondent has an obligation to make a bona fide effort to find staff members another suitable post, assuming that such a post can be found, and with due regard to the relative competence, integrity and length of service of that staff member. There is no comparable rule for 200 series staff members, because, in theory, every 200 series post is created with the expectation that it will end at some point, either when the project it supports is finished or when the funding for such project no longer exists. It would be unreasonable and unwieldy for the Respondent to incur obligations similar to those required under 109.1(c) for a 200 series post, which, again, is inherently temporary.

The Tribunal concurs with the JAB and finds that the Applicant's post was not abolished but that his contract was not renewed and the duties previously performed by the Applicant were merely assumed by others and other departments.

IX. For the reasons set forth above, the Tribunal finds that the Respondent had no obligation to engage in a search to find the Applicant a suitable, alternate post. Again, the Tribunal relies on the inherently temporary nature of the Applicant's appointment under the 200 series and the fact that the obligation to find alternative suitable employment is an obligation imposed upon the Respondent by the rules of the 100

series, not the rules of the 200 series. The Tribunal notes the lack of evidence that the Applicant himself made any effort in regard to finding other employment within UNCHS, UNON, in the field or anywhere else in the United Nations system. Although the Applicant alleges that he was out of the country when a post, with essentially his job functions, was re-advertised by UNON, and therefore, he was precluded from submitting an application, there is no evidence that the Applicant applied for this job when it was first advertised (while he was employed) or that he applied for any other jobs within UNCHS, UNON or any other agency of the United Nations at any other time, subsequent to the recommendations of the Revitalization Team to downsize the UNCHS or subsequent to the time when the Applicant first learned of the financial difficulties of UNCHS. Even after he learned that his contract would not be renewed, in November 1998, and when his contract was extended for three months in December 1998, he did not apply for other jobs. It would appear only reasonable that, under these circumstances, where the Respondent had no legal obligation to find suitable replacement employment for the Applicant, that the Applicant himself should make at least as much effort as he expected of the Respondent, with respect to a job search. He did not.

X. The Applicant further argues that the Respondent's decisions - not to renew, not to convert and not to engage in a search for a suitable post - constituted an abuse of discretion and were motivated by discrimination against the Applicant. In support of this claim, the Applicant alleges that the Respondent gave no reason for the non-renewal, at first, and then later, identified the reason, according to the Applicant's characterization, as "abolition of post", as if this were an indication of discrimination towards the Applicant or evidence of abuse of discretion. In addition, the Applicant asserts that the Respondent's "abolition" of his post and failure to propose him as a candidate for other posts, is further evidence of discrimination.

The Tribunal concurs with the conclusions of the JAB, which held that the Respondent's decisions were properly made by the Respondent, who generally enjoys broad discretion in making decisions of this kind. Only where the Respondent's discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive, discrimination, for example, is such discretion subject to limitation. (See Judgement No. 981, *Masri* (2000), para. VII.).

In the case of prejudice or discrimination, the Tribunal has consistently held that the burden of proving such extraneous factors lies with the staff member, who must adduce convincing evidence. (See Judgement No. 834, *Kumar* (1997).) Where the extraneous factor alleged is an abuse of discretion, and the Respondent provides a justification for its exercise of discretion, said exercise is examined for consistency between the reason enunciated and the evidence. (See Judgement No. 1003, *Shasha'a* (2001).) The Applicant has failed to "adduce with convincing evidence" of discrimination against him. With respect to the Respondent's exercise of discretion, the Respondent's initial failure to provide any explanation for his decision not to renew was well within his discretion. The Respondent's subsequent explanation, that the decision not to renew was made to avoid job duty redundancy, was consistent with the evidence, and therefore, proper.

Thus the Tribunal finds that the Applicant has failed to provide evidence that the Respondent acted discriminatorily towards him or that any decisions made by the Respondent were discriminatory or an abuse of discretion.

XI. The Tribunal next addresses the Applicant's claim that he was entitled to a separation package comparable to that provided to staff on permanent appointment. Permanent appointment status carries with it certain benefits, not the least of which is an indemnity payment made to permanent staff members upon termination from service, as stipulated in staff rule 109.4. The Applicant was admittedly never on a permanent appointment, and his comparison to the treatment given to permanent staff members is inappropriate. Posts in the 200 series, which are temporary in nature, do not carry like benefits. The Applicant also is not entitled to a termination indemnity pursuant to staff rule 209.5, which provides, in relevant part: "Project Personnel whose appointments are terminated shall be paid termination indemnity". Again, the Applicant's appointment was not terminated; it expired pursuant to its terms and was not renewed.

Finally, the Applicant's reliance on benefits provided to individuals whose contracts were terminated pursuant to an "agreed termination" is also inapposite. An "agreed termination" is a negotiated termination, to which both the Respondent and the staff member must agree. The Applicant did not separate from employment subject to an "agreed termination" and his comparison of his separation to those involving "agreed terminations" is irrelevant. The Tribunal denies the Applicant's claim for a separation package comparable to that received by certain staff on permanent appointment.

XII. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(*Signatures*)

Julio **Barboza**
President

Omer Youssif **Bireedo**
Member

Jacqueline R. **Scott**
Member

New York, 21 November 2003

Maritza **Struyvenberg**
Executive Secretary